



Response to Evidence Call by House of Lords Constitution Committee on the Constitutional Implications of COVID-19 on Courts

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This submission is based on academic research undertaken by the author and colleagues at the School of Law, Ulster University, in partnership with the Northern Ireland Human Rights Commission, funded by the Nuffield Foundation. The research was a two year study, which provided an empirical analysis of how litigants in person (LIPs) participate in legal proceedings. Details of that research are available at www.ulster.ac.uk/litigantsinperson. In order to address the evidence gap on how remote justice is impacting on LIPs further analysis of that evidence was published at <https://www.modernlawreview.co.uk/mckeever-remote-justice/>.

In summary, our research established what the intellectual, practical, emotional and attitudinal barriers are for LIPs to participate in face-to-face court proceedings. Our research does not provide any basis for asserting that remote hearings are not compatible with effective participation. Indeed, our findings are that face-to-face hearings present risks to the LIP's Article 6 ECHR right to effective participation and so should not necessarily be considered as the standard to be replicated in remote hearings. What we can say, however, is that there are barriers to participation that will apply to remote hearings that will need to be overcome. This includes addressing the ability of the LIP to understand the legal issues and process – whether the process is an online version of a face-to-face hearing, or a new approach to ensuring that parties can engage and work collaboratively to progress the legal issues.

There are additional practical barriers with remote hearings, compared to face-to-face, that may present substantial problems for participation, however, particularly where digital exclusions apply. This may further complicate pre-existing problems of access to advice and support services, where those services are no longer able to operate on a face-to-face basis. The pandemic has displaced economic rationalisation as the dominant driving force in digital justice, but it is equally clear that remote digital hearings are not economically rational in all jurisdictions, with [evidence of additional time costs for judges and lawyers](#), which should be considered alongside the access to justice costs of LIPs not being able to overcome digital barriers.

The emotional toll of remote justice beyond the court building also needs to be monitored. Our research reinforces concerns raised by [others](#) on the potential for this barrier to both increase and decrease with remote hearings. For some LIPs, the court building was an intimidating space in which their powerlessness was felt to increase and the waiting game necessitated by long court lists could increase their anxiety on the day. Remote hearings have the potential to remove these concerns, providing dedicated time slots for hearings, with the advantage that LIPs do not have to travel to unfamiliar surroundings. In the alternative, however, the emotional experience for LIPs could be improved significantly in face-to-face hearings by the humanisation of the process, achieved through human contact with court clerks, ushers, representatives and judges, in a neutral [environment that reflected the gravity of their dispute](#). LIPs were often upset at what they regarded as an over-familiarisation between representatives and judges that they witnessed at the hearings, and this has the potential to compound the relative lack of gravitas that online hearings might convey if [this behaviour is also observed for online hearings](#).

Perhaps the most significant barrier faced by LIPs is attitudinal and this is likely to be where the real test for participation in remote hearings is faced. If LIPs are automatically regarded as an aberration in a system designed to accommodate represented parties, then a new online system that regards their participation as less of a priority than the participation of legal representatives suggests that the prevailing alienation of LIPs will continue. If, however, the processes to accommodate remote hearings regard LIP participation as a priority, or at least as of equal value to the participation of other court actors, then that design feature will help to break down the view of LIPs as breaching the legal 'norm'. This would represent a considerable advance in ensuring effective participation.

Virtual proceedings

1. How effective are virtual court and tribunal proceedings? What are the benefits, disadvantages and challenges of virtual proceedings?

One of the benefits of virtual proceedings is that they will require listed time slots for each hearing, in contrast to the usual court practice of listing all cases for 10.30am and judges working through the list, which inevitably means that some cases are left to the end of the list. Judges in our research often prioritised represented cases, so LIPs were left waiting for hours until their case was called. Not having to wait in an unfamiliar setting for extended periods, often with no information on when the case would be heard, and having to manage the costs of parking along with employment and childcare issues as a result, would have been a potential advantage to hearings where LIPs dial in at a specific time.

The disadvantages are that there may be not just digital exclusion but a lack of digital literacy combined with low levels of legal capability – the ability to prepare and navigate e-bundles, move between screens, etc. Practical barriers for parents litigating proceedings on family issues without a lawyer include the difficulty of taking part in a hearing while their children are either with them, or visible on the screen of the resident parent. The instructions from court to find a quiet space without interruption is likely to be unachievable, particularly if childcare/education provision is limited. Other concerns raised in existing reviews relate to the hampering of free flowing questioning by judges or legal representatives, a particular issue for LIPs where judges in our research would have taken the opportunity to intervene to clarify or confirm the exchange with LIPs. Our judicial participants spoke of being responsive to the emotional barriers that LIPs face, through identifying physical cues of LIPs indicating anxiety, confusion, agitation. The ability to interpret such cues is likely to be severely inhibited in phone hearings, and will also be impacted in video hearings. The main disadvantage however is that we do not know if LIP hearings are taking place at the same level as represented hearings, proportionate to the differences in face-to-face hearings. We know that lower courts with higher LIP participation, including family proceedings courts, are less likely to be proceeding, unless in cases of urgency.

2. What is the impact of virtual proceedings on (1) litigants, (2) lawyers, (3) judges, (4) court staff, (5) media, (6) the public? What support is available to them and what is required? –

The impact that may be of greatest concern for remote justice for LIPs is if the virtual court system replicates the attitudes towards LIPs that exist in face-to-face proceedings, namely that LIPs are more difficult to accommodate and they become an additional consideration to be factored in, once the difficulties faced by represented parties have been accommodated. Where LIPs are seen as breaching the ‘norm’ of court proceedings, their inclusion in new proceedings that replicate the norm will automatically be compromised. In practical terms, the impact on resolving cases may be substantial since the opportunity for out of court discussions to be facilitated is reduced. For LIPs in our research, there was suspicion and ignorance about how the court system worked and it was in the building of relationships between LIPs and court actors outside the court hearing rooms that enabled many issues to be agreed prior to, or during adjournments in, hearings. Further practical impacts will be on digital capability and the leeway that will need to be given to LIPs on the technical requirements for submission of e-bundles.

3. What are the implications of virtual proceedings for: (1) access to justice, (2) participation in and fairness of proceedings, (3) transparency and media reporting, (4) adversarial vs inquisitorial styles of proceeding?

The overall finding from the reviews of remote justice suggests that those courts dealing with questions of law rather than contestations of fact are better suited to remote hearings, compared to the lower courts involved in fact-finding based on lay participation, where there are significant challenges in ensuring that such participation is effective. Despite urgent pleas in the rapid reviews for evidence from litigants in person (LIPs), relatively little evidence of this sort has been available. Research by the author and colleagues at Ulster University, working with the Northern Ireland Human Rights Commission, provides an empirically-based insight into how to deal with the barriers that block legal participation for LIPS, that informs what being able to participate effectively means in practice, and which can help address the current evidence gap.

The focus of the empirical research on civil and family courts was on the impact that litigating in person could have on access to justice. This was framed in human rights terms as the right to a fair trial under Article 6 ECHR, which encompasses a right for all litigants to participate effectively in civil litigation in which they are involved. The research established that self-representation posed risks to the rights of LIPs under Article 6 ECHR to participate effectively in their legal proceedings. The risks were generated by different barriers to participation faced by LIPs, which the research defines as intellectual, practical, emotional and attitudinal:

- **Intellectual barriers** are those which prevent the individual from understanding how the legal process works. The main intellectual barriers were that LIPs did not comprehend the legal language used in court documents and proceedings. This included many commonly-used legal phrases that were put to LIPs without any awareness by court actors that they might not be clear. Commonly, the LIPs did not understand how to apply legal rules to their case or the legal framework the court would use to make decisions. The consistent theme that emerged for LIPs was that of ‘not knowing’, in common with the finding from other LIP research of

“substantive and procedural naivety of unrepresented litigants”, which raises a fundamental question over how can LIPs participate in a process they do not understand.

- **Practical barriers** relate to not knowing how or where to get help to deal with the legal process and associated issues, ranging from the significant to the mundane. The most obvious and common issue was that of cost – LIPs who felt unable to afford the cost of legal representation and yet who did not appear to be eligible for legal aid. Practical issues beyond this arose from the lack of support for LIPs, including the absence of any central information point. This highlighted two major problems: first, that there was a lack of information and resources to assist either with the general legal issues or the task of self-representation; and second, that the information sources that existed were disparate, unknown and LIPs were unclear as to the extent to which they could be trusted. Added to this was the lack of information about the reality of how cases progress, with court actors expecting multiple hearings (often to accommodate the additional time that LIPs needed) while LIPs saw a continual need to attend court as a practical difficulty. A final but important practical barrier for LIP participation was that the court service did not know if a litigant was going to be represented until the court hearing, making it more difficult to address some of the practical solutions that could be targeted at LIPs.
- **Emotional barriers** arise from the negative feelings associated with both the process and the issue being litigated, and these can then be exacerbated by being unable to overcome intellectual or practical barriers. The most obvious emotional barriers included LIPs struggling to be objective about their case, dealing with the anxiety about the facts of the case that they were living through beyond the court room. This could translate into a struggle to manage emotions to engage with the judge.
- **Attitudinal barriers** exist where the LIP is not seen as a legitimate court actor, but rather one who is disrupting the system. This arose from having to deal with court actors’ stereotypically negative view of LIP behaviour, which resulted in the default assumption (and behavioural consequence) that LIPs would be difficult to deal with. This negativity was not without basis, with some LIPs equally strident in their negative views about court actors and equally unwilling to engage with court actors for this reason, but what it pointed to was a resentment by both LIPs and court actors that the system was not adapting to this breach of the legal ‘norm’. Both cause and effect were evident, with court actors unhappy about adapting to accommodate LIPs’ needs fed by an overall unwillingness to recognise LIPs as a legitimate part of the court system.

The ability of LIPs to participate in all hearings, whether face-to-face or remote, reflects power imbalances between the parties and between the LIP and the judge, the lack of legal capability including digital exclusion, the in/adequacy of access to support services, procedural demands that exacerbate litigant vulnerabilities, and the failure to make adjustments for the non-practitioner status of LIPs.

Participation in legal hearings is not a binary process, whereby a litigant either participates or does not participate. Rather, there are different types of legal participation, defined by the extent to which the intellectual, practical, emotional and attitudinal barriers to participation can be

managed or overcome. The requirement for effective participation under Article 6 ECHR has not been removed by the need to revert to remote hearings. Remote hearings therefore need to be attentive to the intellectual, practical, emotional and attitudinal barriers that block these types of participation.

Some of the barriers can be managed through pre-hearing support and our research drives home the fact that effective participation is not limited merely to what happens in a court hearing. The current court system is poor at identifying, in advance of hearings, whether litigants will be self-representing and for that reason it can be difficult for court services to direct support to LIPs that would assist their preparation for and participation in their hearings. Remote hearings may present a good opportunity for the court service to improve its data collection: making the necessary arrangements for remote hearings helps provides a mechanism for the court service to identify LIPs in time to direct them towards relevant resources, whether internal to the court system – for example, court clerks who can advise on some of the procedural issues including the nature of the hearing that has been listed and who will be attending – or to external support services, either through advice agencies where there is capacity and expertise, or online services that might exist.

Directing LIPs to support and providing them with trusted contacts within the court system could therefore help them to engage more fully in the hearing, addressing the participative barriers that exist. This comes with the caveat that judicial and court service staff should be realistic about what external support can provide. In our research, court actors often made generalised comments referring LIPs to advice, pro bono and other services that were not always consistent with what was available. Again, at a time when face to face advice and support is necessarily limited and advice services are under pressure (see [here](#) and [here](#)), expectations on how LIPs can be supported externally may need to be addressed.

The importance of trust was also critical to boosting the participative potential for LIPs. In face-to-face proceedings, this was often achieved outside of court through informal discussions between the LIPs and court actors. In our research, the judges spoke of being responsive to litigants' reactions, including physical cues that the LIP was becoming upset, agitated, angry or confused. Interventions by judges to enable breaks in proceedings or refocusing the hearing could be helpful, although researchers also observed instances where the physical cues from judges and legal representatives towards LIPs – indicating frustration, impatience, annoyance – were themselves the cause of LIPs feeling alienated or isolated. The relative difficulty in responding to, misinterpreting or missing visual cues in remote hearings (either by LIPs or judges) may be an increased risk factor for effective participation.

Ultimately the most significant contributor to effective participation was communication that takes account of the LIP's non-practitioner status. This includes the practical aspects of case management and hearing procedures – for example, court timings, who will be present, how parties will be connected, who they can contact with queries, when to speak, when to remain quiet, whether the process will involve breaks in proceedings, or break-out rooms for litigants and representatives to have 'out of court' discussions – as well as the procedural preparation

that allows the case to progress – for example that the LIP has prepared (and been able to share where necessary) the paperwork and other submissions required for the hearings, as directed.

A potential advantage to LIPs of remote hearings is that they would no longer be required to attend court for an undefined period of time, which presents difficulties for work and caring commitments – dealing directly with the obstruction that can be a feature of face-to-face hearings – but other issues around connectivity, digital skills and having the space at home to focus on the hearing would need to be considered, along with broader concerns over the additional needs of those with protected characteristics, the contraction of public space and the impact on open justice. Our research evidenced the hard work done outside of court to settle and agree issues, but that there was a need for expectations concerning these out of court actions to be realistic. There may be greater difficulty in accommodating these more informal discussions via remote hearings and so judges may need to be prepared to either manage their usual expectations on what can be achieved or the court service will need to find ways to facilitate these discussions.

Effective communication during the court hearing covers a range of issues, including that the LIP understands the relevance of points raised, is able to follow the proceedings, is able to make him- or herself understood, is able to introduce and respond to relevant issues, and understand the consequences of decisions or court directions. The role of the judge is clearly central to communication in the hearing. For participative barriers to be mitigated, if not overcome, the judge needs: to ensure that the LIP understands the process, procedures and legal terms; to avoid replicating the familiarity that can be assumed with legal representatives; and to give the LIP given space and time to consider his or her response.

In non-remote LIP hearings that we observed, any explanations provided to LIPs were on the basis of what ‘usually’ happened in such hearings, with expectations premised on what the norm was in hearings where both parties were legally represented. Remote hearings provide an opportunity for judges to reflect on whether such comparisons with the old ‘norm’ are helpful or whether it would be possible to set out new ground rules (still rooted in existing evidential and procedural obligations) that assume an unfamiliarity by both parties with all aspects of how the hearing will be conducted. This may give greater potential for judges to ensure that an LIP has opportunities to communicate his or her views and needs, and to adopt a more inquisitorial approach in order to obtain the facts and information required, if they have not already been presented. The flow of questioning and discussion in a face-to-face hearing that would potentially elicit the necessary information may be more stilted in remote hearings, and so being attentive to the need to explore points beyond the questions and answers should be considered.

4. What difference, if any, might virtual proceedings make to the outcomes of cases? –

While we have very little evidence on how LIPs are managing remote hearings, we have even less evidence on those litigants or potential litigants who drop out of the system, or feel excluded from entering. The lack of inclusive court processes for LIPs in face-to-face court hearings was a major barrier to their ability to participate. The delays also created ‘referral fatigue’ – where LIPs felt pushed from pillar to post or obstructed by delays in the resolution of their case, resulting in

fatigue that ended with them giving up – a phenomenon that might be evident if their cases are judged as ‘too difficult to manage’ with consequential delays.

5. What further research or data are required in order to understand the impact of virtual proceedings?

There is a particular absence of data on how virtual proceedings are impacting on litigants who do not have legal support or representation, for whom the challenge of navigating the court system is already substantial. For all litigants there is an absence of data on case outcomes. This could be measured as a form of procedural justice, determining how LIPs and represented participants are able to participate in virtual proceedings and what the impact of addressing the barriers to their participation could be.

6. Are the IT systems in the courts fit for purpose to support virtual proceedings?

The issue may not simply be with the court service IT and software but with available bandwidth, that may limit the ability to schedule multiple virtual hearings simultaneously.

7. Are certain types of case more/less suitable for virtual proceedings? If so, which ones?

The evidence to date would suggest that law-heavy cases based primarily on legal submissions and arguments are better suited to virtual hearings than those that deal with contested facts. There is potential for courts to assume that cases involving LIPs are less well suited to virtual proceedings, but while there are likely to be barriers for this cohort, if the system was developed with their inclusion as core to the design many of those barriers could be overcome, and the advantages of remote hearings for LIPs could be realised. The concern is not that the assumption is right or wrong, but rather that it is untested and may appear to be an assumption based on convenience rather than consideration of what could be done to make their participation in virtual proceedings more suitable.

10. What changes should be made to HM Courts and Tribunal Service’s courts modernisation programme as a result of the operation of virtual proceedings during the pandemic? –

There is an urgent need for effective data collection, across all protected characteristics. The current crisis also presents an opportunity for courts to collect data on the numbers of LIPs in cases – something that is currently not done. At present, a court does not know whether a litigant is represented or not until they appear at court. For virtual proceedings, litigants without lawyers will be identifiable from the point at which joining instructions are required to be sent out. Being able to capture this data, and to amend it during the course of litigation will help courts understand in real time to understand what the characteristics of these users are, including patterns of representation.